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No. 92-1408

In the Supreme Court of the United States

OCTOBER TERM, 1992

JOHN PATRICK ROGALA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the enhancement of petitioner's sentence for his aggravating role in the offense, under Sentencing Guidelines § 3B1.1(a), violated the Ex Post Facto Clause.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	6

TABLE OF AUTHORITIES

Cases:

Collins v. *Youngblood*, 497 U.S. 37 (1990)	4
Stinson v. *United States*, cert. granted, No. 91-8685 (Nov. 9, 1992)	4
United States v. *Furlow*, 952 F.2d 171 (1991), vacated and superseded, 980 F.2d 476 (8th Cir. 1992), petition for cert. pending, No. 92-7503	6
United States v. *Mir*, 919 F.2d 940 (5th Cir. 1990)	3, 4
United States v. *Murillo*, 933 F.2d 195 (3d Cir. 1991)	6
United States v. *Rodgers*, 951 F.2d 1220, modified, 972 F.2d 1253 (1992), modified, 981 F.2d 497 (11th Cir. 1993)	6
United States v. *Saucedo*, 950 F.2d 1508 (1991), judgment on remand aff'd, 977 F.2d 597 (10th Cir. 1992), cert. denied, 113 S. Ct. 1343 (1993)	6
Weaver v. *Graham*, 450 U.S. 24 (1981)	5

Constitution, statutes and rules:

U.S. Const.:	
Art. I, § 9, Cl. 3 (Ex Post Facto Clause)	3, 4, 5, 6
Art. I, § 10, Cl. 1	5
18 U.S.C. 1956(a)(1)(B)(i)	2
18 U.S.C. 3553(a)(1)	4
21 U.S.C. 841(a)(1)	2
Sentencing Guidelines:	
§ 1B1.3	3
§ 3B1.1	3, 4, 6
§ 3B1.1(a)	3, 4, 5

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A2-A3) is not reported, but the judgment is noted at 973 F.2d 924 (Table).

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on August 18, 1992. The petition for rehearing was denied on September 30, 1992. Pet. App. A4. The petition for a writ of certiorari was filed on December 28, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After pleading guilty in the United States District Court for the Western District of Texas, petitioner was convicted of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i). He was sentenced to concurrent prison terms of 240 months on the possession count and 60 months on the money laundering count, to be followed by five years of supervised release. He was also fined $25,000 on each count. The court of appeals affirmed. Pet. App. A2-A3.

1. Petitioner was a principal figure in a drug organization headed by Roy Lee Hodgkiss. The organization was responsible for the distribution of at least 225 kilograms of cocaine, 40 pounds of methamphetamine, 34 pounds of amphetamine, and 1,391 pounds of marijuana. Petitioner developed a system for the transportation of cocaine from Florida to Texas that involved the exchange of automobiles parked at shopping malls. In addition, he set up a series of stash houses that were used to disguise the organization's drug activities. On November 1, 1988, petitioner possessed 500 grams of cocaine for distribution to associates of Hodgkiss—the offense to which he pleaded guilty. Gov't C.A. Br. 3-9.

During 1988 and 1989, petitioner shipped multi-ounce quantities of cocaine to Australia and became involved in the attempted smuggling of cocaine and marijuana from Mexico. Petitioner used a fictitious employment history to conceal his income from drug trafficking, and he used that income to purchase three automobiles, an $80,000 sailboat, and real estate. In addition, he kept more than $100,000 of his illicit income in bank accounts outside the United States. Gov't C.A. Br. 3-9.

2. At sentencing, the district court found that petitioner had an aggravating role in the offense because

he was an organizer of extensive criminal activity involving five or more participants. Accordingly, the district court enhanced petitioner's sentence by four levels under Sentencing Guidelines § 3B1.1(a). Although the government and petitioner stipulated that no more than two individuals were involved in the particular possession offense to which petitioner pleaded guilty, Gov't C.A. Br. 14, the evidence showed that petitioner supervised more than seven individuals in connection with his overall drug distribution activities, *id.* at 10.

3. On appeal, petitioner contended that the enhancement of his sentence was improper because fewer than five individuals participated in the transaction to which he pleaded guilty. He further argued that, in construing Guidelines § 3B1.1, the court of appeals was barred by the Ex Post Facto Clause, U.S. Const. Art. I, § 9, Cl. 3, from relying on the November 1, 1990, amendment to the Introductory Commentary to the Guideline, because that amendment was adopted after petitioner committed his offense. The amendment provides that "[t]he determination of the defendant's role in the offense is to be made on the basis of all the conduct within the scope of § 1B1.3 (Relevant Conduct), * * * and not solely on the basis of elements and acts cited in the count of conviction."

The court of appeals rejected petitioner's claim, relying on previous Fifth Circuit authority declining to define a "transactional participant so narrowly as to preclude any examination of the context of the crime beyond the minimal elements necessary for conviction." Pet. App. A3, quoting *United States* v. *Mir*, 919 F.2d 940, 945 (5th Cir. 1990). The court reasoned that the enhancement was proper because, "[w]hile five people did not participate in the sale of cocaine to which [petitioner pled] guilty, he would not have been able to sell the cocaine without his wholesale distribution organization," which included more than five participants. Pet.

App. A3. The court did not address petitioner's ex post facto argument.

ARGUMENT

Petitioner contends that his sentence enhancement under Guidelines § 3B1.1(a) violated the Ex Post Facto Clause because it rested on the November 1, 1990, amendment to the Guideline. Although the court of appeals did not allude to the amendment in upholding the enhancement, it relied on its previous opinion in *United States* v. *Mir*, *supra*, which held that, even under the law prior to the amendment, a sentencing judge could determine the propriety of a role in the offense adjustment by looking beyond the precise activity comprising the bare elements of the offense charged. 919 F.2d at 945.[1]

The Ex Post Facto Clause provides that Congress may not "punish as a crime an act previously committed, which was innocent when done; nor make more burdensome the punishment for a crime, after its commission; nor deprive one charged with crime of any defense available according to law at the time when the act was committed." *Collins* v. *Youngblood*, 497 U.S. 37, 52 (1990). The purpose of the prohibition is "to assure that legislative Acts give fair warning of their effect and

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[1] This case does not present the issue, currently before the Court in *Stinson* v. *United States*, cert. granted, No. 91-8685 (Nov. 9, 1992), of whether an appellate court may, consistent with the statutory requirement that defendants be sentenced according to the Guidelines in effect at the time of sentencing, 18 U.S.C. 3553(a)(1), apply amended commentary that took effect after the defendant was sentenced. The amended commentary to Section 3B1.1 became effective after petitioner committed his offense but before he was sentenced. The sole issue raised by petitioner is whether the Ex Post Facto Clause bars the application of the amended commentary in these circumstances, an issue not presented in *Stinson*.

permit individuals to rely on their meaning until explicitly changed." *Weaver* v. *Graham*, 450 U.S. 24, 28-29 (1981).[2]

This case does not implicate the Ex Post Facto Clause, because the district court's enhancement of petitioner's sentence was consistent with Fifth Circuit case law preceding the effective date of the amended commentary. As the court of appeals explained in *Mir*, pre-amendment Fifth Circuit decisions established that "the section 3B1.1(a) adjustment must be anchored to the transaction leading to the conviction." 919 F.2d at 944. The "transaction" was not seen as limited to the "minimal elements necessary for conviction," but instead was defined by "the contours of the underlying scheme itself." *Id.* at 945. Accordingly, "[a]ll participation firmly based in that underlying transaction [was] ripe for consideration * * *." *Ibid.* Although the *Mir* court referred to the amended commentary in confirming that a sentencing court may look beyond the confines of the elements of the charged offense in applying Section 3B1.1, it made clear that its decision was grounded on pre-amendment Fifth Circuit pre-cedent. 919 F.2d at 945-946.

In this case, the court of appeals, relying on *Mir*, correctly concluded that petitioner's underlings in the drug trafficking enterprise were "transactional participants" within the meaning of pre-amendment Fifth Circuit case law. The court reasoned that petitioner would not have been able to commit the offense of conviction without his wholesale distribution organization. Since *Mir* leaves little doubt that petitioner would have received the same

[2] *Collins* and *Weaver* did not involve the Ex Post Facto Clause applicable to the federal government; instead, they involved the parallel Ex Post Facto Clause applicable to the States, Art. I, § 10, Cl. 1. The two clauses, however, have always been interpreted to embody identical substantive standards.

role in the offense enhancement even if the commentary to Section 3B1.1 had not been amended, no ex post facto issue is presented in this case.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] The cases on which petitioner relies do not help him. In *United States* v. *Saucedo*, 950 F.2d 1508 (1991), judgment on remand aff'd, 977 F.2d 597 (10th Cir. 1992), cert. denied, 113 S. Ct. 1343 (1993), and *United States* v. *Murillo*, 933 F.2d 195 (3d Cir. 1991), unlike in this case, retroactive application of the amended commentary would have resulted in a sentence at odds with the court's independent understanding of Section 3B1.1. In *United States* v. *Furlow*, 952 F.2d 171 (8th Cir. 1991), the court vacated a role in the offense enhancement, declining to apply the amended commentary retroactively. However, that decision was subsequently vacated by the en banc court of appeals, which reinstated the enhancement by an equally divided vote. 980 F.2d 476, 478 (8th Cir. 1992), petition for cert. pending, No. 92-7503. In *United States* v. *Rodgers*, 951 F.2d 1220, modified, 972 F.2d 1253 (1992), modified, 981 F.2d 497 (11th Cir. 1993) the court did not address any issue under the Ex Post Facto Clause.